United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1084

To be argued by
LAWRENCE B. PEDOWITZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1084

UNITED STATES OF AMERICA,
Appellee,

—v.—

HARRY G. HACKETT, JR.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Harry G. Hackett, Jr., appeals from a judgment of conviction entered on January 30, 1976 in the United States District Court for the Southern District of New York, after a seven-day trial before the Honorable Edmund L. Palmieri, United States District Judge, and a jury.

Indictment 74 Cr. 943, filed October 7, 1974, charged the defendant Harry G. Hackett, Jr., in Count One with having conspired together with Richard D. Johns and Leon S. Laws to distribute and possess with intent to distribute narcotic drug controlled substances, in violation of Title 21, United States Code, Section 846. Counts Two and Three charged Hackett with having distributed and possessed with intent to distribute 24.75 grams of cocaine on June 26, 1974 and 54.18 grams of cocaine on

July 23, 1974, respectively, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A). In Count Four Hackett was charged with having possessed with intent to distribute 4.77 grams of cocaine on July 23, 1974, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A). Hackett was charged in Count Five with having possessed with intent to distribute 871.96 grams of marijuana, in violation of Title, United States Code, Sections 841(a)(1) and 841 (b)(1)(B).

Trial commenced on November 24, 1975, and on December 2 and 3, 1975 the jury returned guilty verdicts against Hackett on all five counts.* On January 30, 1976, Hackett was sentenced to concurrent terms of six years imprisonment on each of the counts, to be followed by concurrent six-year special parole terms on Counts One through Four and a four-year special parole term on Count Five.

Statement of Facts

The Government's Case

The proof at trial demonstrated overwhelmingly that Hackett was a ready source of illicit drugs who, on June 26, 1974 and July 23, 1974, provided Richard Johns with one ounce and two ounces, respectively, of cocaine which Johns in turn attempted to sell to two undercover police officers.

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* Prior to trial co-defendant Richard Johns pleaded guilty to Count One. Johns testified for the Government at Hackett's trial and was later sentenced to 3 years imprisonment, execution of which was suspended, and was placed on probation for 3 years. Co-defendant Laws pleaded guilty to Count Five prior to trial and was later sentenced to a term of one year's imprisonment, execution of which was suspended, and was placed on probation for 2 years. Laws did not testify at Hackett's trial.

A. The June 26, 1974 transaction and what preceded it.

In April 1974, Eddie Newton, an undercover police officer assigned to the Drug Enforcement Administration Task Force, was introduced by an informant to Richard Johns at John's apartment in Brooklyn. Johns, at Officer Newton's request, later took Newton to another individual's apartment in Brooklyn, where he introduced Newton so that Newton could negotiate for the purchase of an ounce of heorin.* After a purchase was completed, Newton told Johns he would be interested in purchasing cocaine if Johns had a supplier. Johns stated that he did. (Tr. 20-22, 24-26).**

Some time later, Johns phoned the defendant Hackett, an old friend who Johns had first met 6 to 8 years earlier when both men lived in Greenwich Village, to determine whether Hackett could supply him with cocaine.*** Hackett agreed to furnish cocaine. (Tr. 221-22, 226).

On the evening of June 26, 1974, Officer Newton placed three tape-recorded telephone calls to Johns to finalize arrangements for the purchase of one ounce of cocaine. During the first call Officer Newton explained that he would not advance any money for the cocaine until he

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* Johns testified at trial that he did not realize that Newton was interested in purchasing heroin, as opposed to cocaine, until after a sale of heroin was completed. (Tr. 263, 274-75). Officer Newton, on the other hand, testified that Johns was fully aware from the outset that the sale was to involve heroin. (Tr. 125-27).

** The abbreviation "Tr." refers to the trial transcript; "GX" to Government Exhibits; "DX" to Defense Exhibits; and "Br." to Hackett's brief.

*** A number of years earlier Hackett and Johns had engaged in marijuana transactions together. (GXs 32, 32A).

actually received the package.* Johns replied that he would have to check with his "man", and Officer Newton said he would call back shortly. (GX 30A). Officer Newton again phoned Johns about half an hour later. Johns said he had not yet contacted his source, but had left a message with his answering service.** When Officer Newton inquired whether in the future Johns would be able to obtain eighth kilogram quantities of cocaine for sale, Johns replied, "Yeah, this is my straight connect here, boy." (Tr. 38; GX 30B). About twenty minutes later Newton placed his third call to Johns. Johns, who had just spoken by phone to Hackett, told Newton everything was set. Johns told Newton to meet him at 95th Street and Riverside Drive in Manhattan at 9:30 that evening. (GX 30C).

Newton, together with a second undercover police officer, Kendall Feurtado, drove to the appointed place. When they arrived, Johns approached their car with a second man, Robert Holcomb, a long time friend of both Johns and Hackett. After brief introductions Johns told Newton to wait while he went to get the ounce. Johns and Holcomb then crossed the street and entered an apartment building at 230 Riverside Drive. The police officers then made a U-turn and pulled in front of the building just in time to see Johns and Holcomb enter the elevator. (Tr. 41-42, 232, 362-64).

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* Each of the phone calls was recorded. The tape was marked as GX 30. Transcripts of the three calls were separately marked as GXs 30A, 30B, and 30C.

** That Harry Hackett had an answering service in June 1974 was established not only by Johns' testimony, but also by the testimony of Hackett's girlfriend June Murphy and certain notations in notebooks seized from Hacketts apartment at the time of his arrest. (Tr. 584; GX 20(c)(3)).

Johns and Holcomb proceeded to Harry Hackett's apartment, number 10A. Once inside the apartment, Hackett and Johns had a brief discussion about the ounce of cocaine, and Hackett then directed Johns to a small medicine vial which contained a small sample of cocaine. Johns picked up the vial and took it downstairs to the police officers. (Tr. 233-34).

Inside the undercover car, Johns handed Officer Feurtado the vial. Feurtado examined the vial, agreed that it contained good quality cocaine, and returned the vial to Johns who promptly returned it to Hackett's apartment. (Tr. 43-44, 235-36, 364-66).

Upon his return, Hackett directed Johns to the ounce package. Johns picked the package up from a table, brought it downstairs to the two undercover officers and in return received $800. Before departing, Johns advised the officers that he could be reached at home any night after 7 P.M. (Tr. 44-45, 235-37, 366-67).

Johns returned to Hackett's apartment to give him his share of the proceeds—$500 to $600. After a brief discussion with Hackett, Johns left the apartment and returned to Brooklyn with Holcomb who had spent his time playing records and relaxing in Hackett's apartment. (Tr. 237-41).

B. The July 23, 1974 transaction and the events that followed it.

On July 23, 1974, Officer Newton placed two tape-recorded phone calls to Johns in an attempt to arrange a purchase of an eighth kilogram of cocaine (approximately four ounces). Twice during the first call, Johns referred to his source by name as "Harry." Johns told Newton that Harry at that time had only two ounces for sale.

Newton agreed to pay $900 per ounce, and Johns told him to again drive to 95th Street and Riverside Drive. (GX 31A, 31B; Tr. 46-59, 242-44).

Officers Newton and Feurtado arrived at 95th Street and Riverside Drive at approximately 9:30 P.M. Their car was equipped with a recording device. A few minutes after they arrived Johns entered the car and said that his source was not at home, but that he expected him shortly. The three men spent the next hour in the undercover car awaiting the arrival of Johns' supplier, Harry Hackett, with Johns occasionally getting out of the car to call Hackett's apartment to see if he had arrived home. While sitting in the car, Johns told the two officers that his supplier had been doing such a brisk business that he had recently run out of plastic bags in which to wrap the drugs and had been forced to use paper bags. Johns also explained how years ago he and Harry had transported marijuana in suitcases, but had decided that dealing in such bulky drugs was too risky. (Tr. 59-64, 245-46, 370; GX 32A).

During this discussion about marijuana transactions, a car pulled up behind the undercover vehicle and double parked. Harry Hackett got out of the car, together with his girl friend, June Murphy Hackett, carrying packages, walked toward the entrance to 230 Riverside Drive. As Hackett walked alongside the undercover car, which was parked parallel to the entranceway to 230 Riverside Drive, he bent down, looked into the car, stared at Newton and Feurtado, and then nodded to Johns. Hackett and Murphy then walked to the elevator, whereupon Hacket turned and continued to stare in the direction of the undercover car. Hackett and Murphy then took the elevator to the tenth floor. (Tr. 65-67, 246-50, 371).

Having seen his supplier Hackett arrive, Johns suddenly broke off the marijuana-related discussion, got out

of the undercover car, and walked around to the side entrance of the apartment building. He was next seen just moments later getting into the elevator on his way to Hackett's apartment on the tenth floor. (Tr. 66-67, 250-51, 350, 372-73; GX 32A).*

Inside apartment 10A, Hackett told Johns he had been shopping and apologized for the delay. (Tr. 252). Meanwhile, outside the apartment building, a gypsy taxicab pulled up and Leon Laws got out carrying a small blue-patterned suitcase. Laws then walked into 230 Riverside Drive and was observed taking the elevator to the tenth floor. (Tr. 67-68, 374-75).

After ringing the doorbell to Hackett's apartment, Laws entered carrying the blue-patterned suitcase. Johns who had once previously seen Laws as he was walking out of Hackett's apartment was introduced to Laws by Hackett. Johns then briefly went to the bathroom, and when he came out, Hackett told him to pick up the two-ounce cocaine package which was on the bed. Johns did so and took the package downstairs to the two police officers. (Tr. 252-55).

Once inside the undercover car, Johns handed the package to Officer Feurtado. A prearranged signal was then given by Officer Newton and Johns was arrested by a number of surveillance officers. The surveillance officers also feigned the arrest of the two undercover officers. (Tr. 68-69, 252, 376-77).

The arresting officers advised Johns that he had the right to remain silent and that anything he said could

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* The police officers were positioned so that they could see the indicator on the top of the elevator. The indicator confirmed that Hackett and Murphy and, moments later, Johns went directly to the tenth floor. (Tr. 66-67; GX 32A).

be used against him, but neglected to advise him of his right to counsel. Johns was also told that he might go to jail for the rest of his life.

Initially, when Johns was questioned he denied, out of loyalty to his long-time friend Hackett, that he had received the cocaine in Hackett's apartment. However, when Officer Newton advised him that he too was a police officer, Johns, realizing the jig was up and that Officer Newton had seen Hackett nod to him, gave a statement implicating Hackett. (Tr. 69-70, 256-59, 350, 393).

Johns was then accompanied by police officers, including Detective Ronald Stanley, to apartment 10A where he knocked on the door. Hackett came to the door dressed in a T-shirt and was placed under arrest. He then asked for an opportunity to get dressed, and the police officers accompanied him from the foyer into the living room. (Tr. 394).

Inside the living room, Detective Stanley heard a noise coming from a bedroom at the rear of the apartment. As he walked toward the doorway to the bedroom, he saw a clear plastic package containing a white powder on top of a scale which was in turn on top of a stereo console. Approaching further, he saw Leon Laws standing by a bed surrounded by plastic bags containing a green vegetable matter. Laws identified himself as a visitor of Hackett's and was placed under arrest. (Tr. 395-96). A search of Laws moments later uncovered a small glass vial containing a small amount of cocaine. (Tr. 396; GX 5).

The police officers then placed a number of phone calls to the Assistant United States Attorney on night duty to determine when it would be possible to apply for a search warrant for Hackett's apartment. When the

officers were advised that a warrant could not be obtained until the next morning, they removed their prisoners from the apartment and left police officer Gary Kuramoto to secure the apartment. (Tr. 398-99, 490-91). Before leaving the apartment Hackett retrieved a shirt and wallet from the bedroom in which Laws had been arrested. (Tr. 400).

The next morning a search warrant was obtained, and Detective Stanley brought a copy of the warrant back to the apartment which he served on the building superintendent before the search. (Tr. 402-03). Detective Stanley then searched the bedroom in which Hackett had obtained a wallet and shirt the previous evening, and he seized the following items:

1. From the stereo console, a plastic bag containing cocaine,* a measuring scale and weights;
2. From the top of a bureau dresser, two bags of marijuana;
3. From the top drawer of the dresser, four glass vials containing small amounts of cocaine, a plastic bag containing marijuana and a manila envelope containing hashish;
4. From the bed, a clear plastic bag containing marijuana, a record album with traces of a white powder, and two plastic calendar cards;**
5. From the top of a night table, a bag of marijuana;

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* The cocaine and dilutants found in this plastic bag were of the same percentages as that found in the package Johns attempted to sell to the undercover officers the night before. The Government's chemist testified that based on a statistical study he had conducted, he believed the cocaine in the two packages came from a common source. (Tr. 497-501, 517).

** Record albums are commonly used as a base for mixing cocaine. Calendar cards are used as instruments in the mixing of the drug. (Tr. 417-20).

6. From a closet, a plastic bag and glass vial containing lactose,* as well as a food storage cup containing traces of cocaine;

7. On the floor next to the bed, the blue print suitcase which Laws had carried into the apartment, containing two large plastic bags filled with marijuana. Also on the floor was a box of baggies, four measuring spoons, a bag of cigarette rolling paper and a strainer;**

8. From the dresser and night table, four spiral notebooks and two telephone books. (GX 6, 7, 8, 9, 10, 11, 13, 14, 15, 17, 18, 19, 20; Tr. 403-07, 497-98, 504-13).

Entries in the seized telephone books, *concededly in Harry Hackett's handwriting* (Tr. 431-32), included the name, address and phone number of Richard Johns and Robert Holcomb. (Tr. 432; GXs 20(1), 20(2). Entries found in the spiral notebooks, again written in Hackett's hand, included "Dick John-2Z Fri." *** (GX 20(a)(4)) and under a listing which was apparently a weekly agenda, "Pass out messages to connects." **** (Tr. 426-28, 433-34). Most incriminating of all, however, was a chart, again concededly in Hackett's own handwriting, which was plainly a narcotics customer's list. Detective Stanley testified that "K" is a common abbreviation for kilograms, "S-8" an abbreviation for eighth kilograms, and "Z" for ounzes. The customer's list (GX 20(a)(3)) read as follows:

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* Lactose—milk sugar—is a common dilutant for cocaine. (Tr. 417).

** Baggies are used to package cocaine for sale; measuring spoons and strainers are used in mixing cocaine; and cigarette paper is used to prepare marijuana for smoking. (Tr. 420-21).

*** "Z" is a common abbreviation in the narcotics trade for an ounze. (Tr. 426).

**** "Connect" is a term used in the drug trade for a supplier. (Tr. 426-28).

¼ to ½	Z	S-8	¼ K	½ to 1 K
Boby	*Jay*	*Dick*	*Bernie*	Bernie
Freddie	Dve Ed	Roy Gold	Joe	*Reny*
Nte	*Perk*	Ric Wat	D.C. Slim	
Herb	*Stregth*	Brian	Mario	
Walter	*Vernon*			
Teddy	Rudy			
Lap	Ken Dawk			
Nolan	Herb			
Snk	Ed Love			
Gliver	Robin Kenyatta			
Susan	Lucian Ferar			
Jimmy Rogers				
Lindsy John in				
Nate Wr				
T Love				

The Government also introduced as a prior similar act Hackett's 1973 tax conviction for the sale of cocaine. (Tr. 524-25, 537; GX 33).

The Defense Case

Hackett did not testify in his own behalf. He did, however, call a number of witnesses to the stand.

Steven Stewart, a cashier of the United States Lines Steamship Co., testified that, on July 23, 1974, the night of Hackett's arrest, he had gone to Hackett's apartment between 10:30 and 11:00 P.M. to attend a previously arranged business meeting with Hackett. When Stewart arrived, he was ushered into the kitchen by police officers, frisked, questioned and eventually released. On cross-examination, Stewart conceded that he knew nothing of the events that had transpired prior to his arrival at the apartment. (Tr. 538-46).

Detective Stanley was recalled by the defense and asked if he recognized Steven Stewart. The detective said that he did indeed recognize him, but believed that Stewart had not arrived at the apartment until about 11:30 P.M. on the night of Hackett's arrest, approximately 45 minutes after Hackett's arrest. (Tr. 550-51).

June Murphy, admittedly in love with Hackett, testified that in mid-June 1974 she had flown to visit her parents in St. Louis. She claimed that before she left, Hackett had told her that when she returned on June 23, 1974, he would be in Washington, D.C. at a seminar. She claimed that, although they began to live together in early July, 1974, she received no letters or phone calls from Hackett from the date of her return on June 23, 1974 until she saw him again in early July. (Tr. 563-64).

Murphy also testified that in early July, 1974, Harry Hackett began staying at her apartment so that his friend Leon Laws could have a place to stay while he waited to get furniture for his own apartment. Murphy claimed that, on July 23, 1974, Hackett had returned to her apartment from work, eaten dinner and then gone shopping with her at A & S in Queens. They then returned to Hackett's apartment with some fruit and vegetables, because Hackett had scheduled a business meeting. After arriving in the apartment, Murphy testified that she and Hackett cleaned up the living room and kitchen, and then Hackett sat down next to her and started preparing notes for the meeting. (Tr. 561-67).

Shortly thereafter, Johns arrived soon followed by Leon Laws. Murphy claimed that Johns and Laws knew each other because she had thrown a party at which both men were present. After arriving, Laws, she testified, headed for the bedroom in which he was living, and Johns followed in the same direction. Johns later left for a short time, and then police officers entered the apartment and arrested her and Hackett. (Tr. 567-68).

On cross-examination, Murphy, exhibiting a remarkable memory, testified that she was absolutely certain Hackett did not make a telephone call on July 23, 1974 at any time from dinner on, because she was with him

"every minute." (Tr. 597-88). Murphy also had a vivid recollection that after Johns and Laws entered the apartment on July 23, 1974, Hackett never once moved from her side. (Tr. 604-06). Despite her capacity for remembering these details, Murphy did not remember having seen the lady's pocketbook which was found leaning against the side of the couch on which she was lying at the time of her arrest and which contained marijuana, even though she testified that she had just minutes before cleaned the living room in anticipation of a business meeting. (Tr. 609).

Murphy denied that she had told Assistant United States Attorney Daniel Pykett on the morning after her arrest that she did not know Johns. (Tr. 575-76). She admitted having told Pykett that she had only seen Laws once—in a restaurant—even though she claimed at trial she had actually met him three or four times. (Tr. 576).

Incredibly, Murphy also claimed that, when Johns had entered the apartment on July 23, 1974, he had asked her where all the other people were for the "meeting", even though Johns' business on July 23rd was obviously unrelated to any meeting between Hackett and Steven Stewart. (Tr. 594).

Henry Thomas, Alexander Aikens III and Edward Hull were called as character witnesses. Each testified that the fact that Hackett had previously been convicted for a narcotics-related felony had no effect on their personal opinion concerning Hackett's reputation for law-abidingness. Predictably, none of these men knew anything about the events of June 26, 1974 or July 23, 1974. (Tr. 650-99).

The Government's Rebuttal Case

To rebut June Murphy's intimation that Hackett might have been in Washington, D.C. on June 26, 1974, the Government called Robert Holcomb. Holcomb, plainly hostile to the Government and a close friend of both Hackett and Johns, testified that he recalled meeting Officer Newton on the corner of 95th Street and Riverside Drive outside of Hackett's apartment building in the summer of 1974 and then accompanying Johns up to Hackett's apartment. He testified that Hackett was present in the apartment that night, and while he did not see Hackett hand anything to Johns, he recalled that Johns had left the apartment and returned later. (Tr. 704-21).

Assistant United States Attorney Pykett testified that when he interviewed June Murphy on July 24, 1974, she had told him (1) she was living alone; (2) she did not know Johns; and (3) she had met Laws once in a restaurant, but did not see him arrive in the apartment on July 23, 1974. Each of these statements was contrary to Murphy's trial testimony. (Tr. 745-49).

To further rebut Murphy's suggestion that Hackett had not lived in his own apartment for approximately two weeks prior to July 23, 1974, Detective Stanley testified that a few days after seizing one of Hackett's address books from the bedroom, Hackett had called him and said that without the address book he was having great difficulty reaching business associates. The book—apparently so necessary for business he could not be without it for a few days, *let alone two weeks*—was eventually returned to Hackett. (Tr. 756-58).

ARGUMENT

POINT I

The Charge On Character Evidence Was Correct. In Any Event, a Timely Objection to the Charge Was Not Taken And Any Conceivable Error Was Harmless.

Hackett argues that the District Court's charge on character evidence was erroneous. Specifically, he contends that the Court's charge in effect instructed the jury that a reasonable doubt could not be predicated on evidence of the defendant's good character, whereas the defendant was entitled to a charge that a reasonable doubt could be based on evidence of the defendant's character alone. These contentions are both factually and legally erroneous.

A. The Charge Was Proper.

It has long been settled that "the accused will be allowed to call witnesses to show that his character was such as would make it unlikely that he would be guilty of the particular crime with which he is charged." *Edgington* v. *United States*, 164 U.S. 361, 363 (1896). In certain circumstances, evidence of good character, when weighed together with other evidence in the case, may be sufficient to create a reasonable doubt. *Id.* at 366; *Michelson* v. *United States*, 335 U.S. 469, 476 (1948).

In full recognition of these well-established principles, Judge Palmieri charged the jury:

> "Now, there was evidence in this case given by two of the defendant's witnesses as to his good character. Good character is to be weighed as a factor in the defendant's favor. You should con-

sider it together with all the facts and circumstances which have been put before you and then give it the weight to which you think it is entitled.

A defendant is not entitled to a verdict of acquittal simply because he possessed a good reputation for honesty or obedience to the law before the indictment.

However, when considered along with all the other evidence the defendant's reputation, like other factors in his favor, may generate a reasonable doubt as to his guilt.

If, after considering all of the evidence introduced in this case, including the evidence of the defendant's reputation for good character, you have a reasonable doubt in your minds with respect to any of the counts of this indictment, you should acquit the defendant.

You should return a verdict of guilty only if you are convinced on the basis of all the evidence, including the evidence of the defendant's reputation for good character, that the charge against the defendant has been proved beyond a reasonable doubt." (Tr. 914-15).

The defendant snatches from this eminently fair and comprehensive charge on character one sentence, *i.e.*, "[a] defendant is not entitled to a verdict of acquittal simply because he possessed a good reputation for honesty and obedience to the law before the indictment." He argues from this out-of-context passage that the jury was told that evidence of the defendant's good character could not engender a reasonable doubt. (Br. at 11). This argument is a superb illustration of the distortions which may be created by pulling phrases out of an integrated instruction.

Examined in context, the challenged sentence merely elaborated on the common-sense notion that the fact that

a defendant had a good reputation prior to the crime did not *automatically* entitle him to an acquittal and that the evidence of good reputation should be considered in the light of the other evidence for and against the defendant. That this was the true import of this remark became plain when the Court went on to say:

> "However, when considered along with all the other evidence the defendant's reputation, like other factors in his favor, may generate a reasonable doubt as to his guilt." (Tr. 914).

This sentence quite clearly informed the jury that, while a good reputation should not automatically lead to an acquittal, such evidence, when considered together with all of the other evidence, could create a reasonable doubt. This theme was then repeated for the jurors:

> "If, after considering all of the evidence introduced in this case, including the evidence of the defendant's reputation for good character you have a reasonable doubt in your minds with respect to any of the counts of this indictment, you should acquit the defendant.
>
> You should return a verdict of guilty only if you are convinced on the basis of all the evidence, including the evidence of the defendant's reputation for good character, that the charge against the defendant has been proved beyond a reasonable doubt." (Tr. 914-15).

Plainly, Hackett's argument is predicated on the parsing of a sentence lifted entirely out of its proper context. This Court has continually refused to accept the invitations of defendants to consider claims of error in character evidence charges by isolating single passages of the charge. *United States* v. *Kabot*, 295 F.2d 848, 855 (2d Cir. 1961), *cert. denied*, 369 U.S. 803 (1962); *United States* v. *Crosby*, 294 F.2d 928, 947-48 (2d Cir. 1961), *cert. denied*,

368 U.S. 984 (1962); *cf. Edgington* v. *United States*, *supra*, 164 U.S. at 365. These cases properly recognize that the impressions left with the jury can only be understood by considering the charge as a whole. See *Cupp* v. *Naughten*, 414 U.S. 141, 146-47 (1973); *Boyd* v. *United States*, 271 U.S. 104, 107 (1926).

Hackett also claims that the jury should have been instructed that a reasonable doubt may be predicated on evidence of the defendant's good character "standing alone." (Br. at 10, 17). Such instructions have repeatedly been rejected by this Court. *United States* v. *Fayette*, 388 F.2d 728, 736-37 (2d Cir. 1968); *United States* v. *Schabert*, 362 F.2d 369, 373 (2d Cir.), *cert. denied*, 385 U.S. 919 (1966); *United States* v. *Lowenthal*, 224 F.2d 248, 249 (2d Cir. 1955) (*per curiam*); *cf. Nash* v. *United States*, 54 F.2d 1006, 1007 (2d Cir.), *cert. denied*, 285 U.S. 556 (1932). This is so because an instruction that a reasonable doubt may be created by character evidence alone misleadingly suggests that in determining whether or not a reasonable doubt exists, proof of good character should be considered in isolation without reference to all of the other evidence.* See, *e.g.*, *Oertle* v. *United States*, 370 F.2d 719, 727 & n. 14 (10th Cir. 1966), *cert. denied*, 387 U.S. 943 (1967).

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* There continues, we believe, to be substantial wisdom in Judge Learned Hand's observations in *Nash* v. *United States*, *supra*, that jurors can be expected to treat character evidence properly when told as little as possible about how to handle it:

> "[E]vidence of good character is to be used like any other, once it gets before the jury, and the less they are told about the grounds for its admission, or what they shall do with it, the more likely they are to use it sensibly. The subject seems to gather mist which discussion serves only to thicken, and which we can scarcely hope to dissipate by anything further we can add." 54 F.2d at 1007.

In *United States* v. *Fayette*, *supra*, for example, defense counsel requested that the following instruction be given:

> "Evidence of the defendant's good character is in the same category as other factual evidence, and must be considered by you in your deliberations, and may, of itself, create a reasonable doubt as to the guilt of the defendant."

This Court quickly disposed of the defendant's claim that the District Court had erred in refusing to give this instruction:

> "This instruction should not be given, at least without the qualification that the so-called character evidence should be considered along with all the other evidence in the case in the determination by the jury of the question of guilt or innocence. United States v. Lowenthal, 224 F.2d 248 (2d Cir. 1955)." 388 F.2d at 737.*

Hackett's reliance in support of the contention that a "standing alone" instruction should have been given on *United States* v. *Minieri*, 303 F.2d 550 (2d Cir.), *cert. denied*, 371 U.S. 847 (1962) and *United States* v. *Cramer*,

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* The First, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits have either approved instructions without "standing alone" language or have expressly rejected such a charge. *United States* v. *Lachmann*, 469 F.2d 1043, 1046 & n.3 (1st Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); *United States* v. *Johnson*, 165 F.2d 42, 48 (3d Cir. 1947), *cert. denied*, 332 U.S. 852 (1948); *Mannix* v. *United States*, 140 F.2d 250, 253 (4th Cir. 1944); *United States* v. *Ramzy*, 446 F.2d 1184, 1186-87 (5th Cir.), *cert. denied*, 404 U.S. 992 (1971); *Poliafico* v. *United States*, 237 F.2d 97, 114 (6th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957); *Black* v. *United States*, 309 F.2d 331, 343-44 (8th Cir. 1962), *cert. denied*, 372 U.S. 934 1963); *Smith* v. *United States*, 305 F.2d 197, 205-07 (9th Cir.), *cert. denied*, 371 U.S. 890 (1962); *Untied States* v. *Oertle*, 370 F.2d 719, 726-27 (10th Cir. 1966), *cert. denied*, 387 U.S. 943 (1967). But see *United States* v. *Lewis*, 482 F.2d 632 (D.C. Cir. 1973).

447 F.2d 210 (2d Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972), is entirely misplaced. The charge delivered in *Minieri* bears not the slightest resemblance to that given here, and it is instructive that the shortcomings of that charge—far greater than any conceivable deficiencies in the instant case—were not found sufficiently prejudicial to warrant reversal. 303 F.2d at 555.* *United States* v. *Cramer*, *supra*, is equally inapposite. There, the Court had charged that evidence of good reputation "may be considered with the other evidence in the case, and may *in connection with the other evidence*, be sufficient to raise a reasonable doubt in your mind . . . ." 447 F.2d at 219 (emphasis supplied). While the instruction in *Cramer* may have incorrectly suggested that something more than just character evidence was needed to create a reasonable doubt to the extent that the charge had referred to character evidence "*in connection with* other evidence", the charge was found sufficiently clear and correct so as not to require reversal. 447 F.2d at 219.**

Finally, Hackett points to a colloquy between defense counsel and the Court during Hackett's summation and argues that the effect of this exchange was to tell the

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* While there is, to be sure, dictum in *Minieri* to the effect that, under certain circumstances, a reasonable doubt may arise from character evidence alone and that a defendant is entitled to "such an instruction," the opinion does not suggest that a "standing alone" charge would be the proper way to instruct the jury on this point of law. If *Minieri* had intended to overrule such earlier Second Circuit cases as *United States* v. *Lowenthal*, *supra*, 224 F.2d 248, those cases would surely have been referred to and carefully discussed.

** Hackett's reliance on *United States* v. *Leigh*, 513 F.2d 781 (5th Cir. 1975), is also misplaced. There, the District Judge intimated in his charge to the jury that evidence of good character was not to be treated like all other defense evidence, but rather as an "excuse" for the crime. While Hackett argues that Judge Palmieri "suggested" that character evidence was offered as an "excuse" (Br. at 11-12), this simply was not the case as any fair reading of the Judge's charge readily discloses.

jury that the evidence adduced with respect to character was not a defense. (Br. at 13). In fact, nothing of the sort occurred as an examination of the record clearly discloses.

During the defense case, Hackett called as a character witness Edward Hull. Hull testified that he was an executive director of a federally-funded anti-poverty program and that Hackett had developed for him a proposal for funding a program aimed at training indigents to drive tractor-trailers. As a result, he testified, twelve individuals were trained as tractor-trailer drivers. Hull went on to testify that his personal opinion was that Hackett was a law-abiding citizen.*

During summation, defense counsel, obviously playing on the emotions of the jury, argued that Hull's testimony showed that as a result of Hackett's efforts

> "twelve people, whose lives were going nowhere, now have jobs, legitimate and good jobs and who may well have families and homes and hope for a future and they got it because of what he [Hackett] did." (Tr. 804).

Aside from the objectionable tenor of these remarks,** this line of argument was clearly improper in that counsel sought to rely on a specific instance of conduct as demonstrating Hackett's character. While Hull's testimony concerning Hackett's employment may have been admis-

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* Defense counsel also asked whether Hull knew that Hackett had been convicted of a crime involving the sale of cocaine, to which Hull responded in the negative. Counsel then asked whether this altered Hull's opinion of Hackett's character as a law-abiding person, and, incredibly, Hull said no. (Tr. 698-99).

** The Court later commented, outside the presence of the jury, that the reference to the truck drivers was improper and an "obvious appeal to sympathy." (Tr. 925).

sible insofar as it explained the nature of Hull's acquaintance with Hackett from which Hull based his opinion on Hackett's character, this predicate for admissibility did not open the door to argue that the effect of this specific instance of conduct on other persons proved Hackett's good character.*

The trial judge, therefore, properly stated:

> "The Court: You are going into great detail about an incident that should never have been testified to by this witness, which is on the record for what it is worth, but I will be compelled to charge this jury that even if they find that your client did things, that would not in and of itself be any basis for delucing [sic, should be deleting], objecting or accepting [sic, should be excepting], any of the evidence in this case.
>
> He has testimony in this case with respect to his good character and I will give them a charge with respect to how they should deal with good character testimony, but for you to give them the details of a community funded program for the purpose of training trailer truck drivers and urge that as a defense in this case is not appropriate, Mr. Ullman.

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* Hackett is simply incorrect when he argues that Rule 405 of the Federal Rules of Evidence now permits such testimony. Specific instances of conduct may only be inquired of a character witness on direct examination when character is an "essential element" of the charge or defense. Rule 405(b). The Advisory Committee Note states that the "the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion." There can be no dispute that Hackett's character was not "in issue" and, thus, that it was only of circumstantial relevance. See 2 Weinstein & Berger, Weinstein's Evidence ¶¶ 404[02], 405[04] (1975).

> Mr. Ullman: Your Honor, it is a fact——
>
> The Court: It is not a defense. You may not urge it as a defense and I am sorry it was allowed to come into the case, but I am constrained to ask the jury to withhold consideration of this testimony until they hear my charge with respect to how to deal with character evidence. There is evidence of the defendant's good character and I will charge you with respect to how to deal with that." (Tr. 805-06).

It is quite obvious that this colloquy did not, as Hackett argues, have the effect of advising the jury that character was not a defense. Nothing of the sort was said or intimated by the trial judge. The Court simply told the jury that while character evidence had been introduced and that they would later be instructed how to treat it, Hackett's involvement in this training program was not a defense to the charges against him.

B. No Timely Objection Was Taken.

Furthermore, no timely objection was taken with respect to the charge on character evidence. After Judge Palmieri had delivered his charge, and before the jury began its deliberations, defense counsel raised only one objection. That objection did not concern the charge on character. (Tr. 925). After making this unrelated objection, counsel was asked if he had any further exceptions, and he replied that he had "nothing further." (Tr. 928).

Approximately an hour after the jury had begun its deliberations, and after the Court had received its first note from the jury requesting certain exhibits, counsel for the first time excepted to the Court's charge on character. (Tr. 931). While the Court granted an exception to

the extent that the Court had earlier declined to charge in the exact language defense counsel had requested in his request to charge,* the Court noted that counsel's failure to object immediately after the charge had prevented the Court from correcting any errors in the charge actually given:

> "The Court: I declined to accept your proposed charge and you have an exception to my declination, but it is also true that you never pointed out the errors in the charge as given or gave me an opportunity to correct any errors that I may have made, although I am not presently aware of any."
>
> * * * * *
>
> "Mr. Pedowitz [the prosecutor]: Maybe counsel can be more specific as to precisely what the charge is. As I read the charge, it seems to me precisely what he had requested.
>
> The Court: I think it is much too late for me to recharge the jury on the question of good character." (Tr. 932).

Defense counsel then made clear that his sole objection to the charge, aside from the Court's failure to deliver the precise words of his request—an objection which is never sufficient, *e.g.*, *Agnew* v. *United States*, 165 U.S. 36, 51 (1897)—, was that the jury should have been instructed that it could find a reasonable doubt based upon character evidence alone *without reference to the other evidence in the case*. (Tr. 933). No reference was made to the claim now loudly trumpeted on appeal that one sentence in the

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* Prior to delivery of the charge, the Court had advised defense counsel that he did not intend to deliver defense counsel's request on character evidence in the precise words requested and at that time also told counsel he had an exception to that extent. (Tr. 845). However, the Court also told counsel, "in the event you are not pleased by the way I am going to submit them [the instructions] to the jury, you can then raise the matter with me after my charge." (Tr. 845).

Judge's instruction had erroneously advised the jury that character testimony could not engender a reasonable doubt.

Rule 30 of the Federal Rules of Criminal Procedure provides that "[n]o party may assign as error any portion of the charge . . . unless he objects thereto *before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection.*" (emphasis supplied). Here, counsel failed to timely object and, when a belated objection was finally raised, failed to address specifically the principal deficiency in the charge now assigned as error. These claims, accordingly, have been waived. See *United States* v. *Goldberg*, 527 F.2d 164, 173 (2d Cir. 1975); *United States* v. *Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974); *United States* v. *Carson*, 464 F.2d, 424, 432 (2d Cir.), *cert. denied*, 409 U.S. 949 (1973).

C. Any Possible Error Was Harmless.

Finally, any error was clearly harmless for two reasons. First, the character witnesses were unconvincing. Each took the stand and testified that their high opinion of Hackett's character for law-abidingness was not affected by the fact that Hackett had a 1973 conviction related to the sale of cocaine. (Tr. 653, 693, 698-99). These witnesses were quite plainly a "mere parade of partisans", *Michelson* v. *United States*, *supra*, 335 U.S. at 479, whose confirmation of the existence of Hackett's prior narcotics conviction was doubtless of more value to the jury than their questionable judgment concerning Hackett's character.

Secondly, the evidence of Hackett's guilt was so overwhelming that three men's opinion about his character for law-abidingness, unshaken in the face of a prior narcotics

felony conviction, could not possibly have affected the verdict. Briefly, the proof showed beyond a doubt that both cocaine sales took place outside of Hackett's apartment. Before the second sale, Johns twice referred to his narcotics supplier as 'Harry". Just before the second sale, and after Johns and the officers had waited for over an hour for "Harry" to arrive, Harry Hackett walked by the undercover car and nodded to Johns. Hackett then entered 230 Riverside Drive and continued to stare at the car as Johns suddenly broke off his conversation with the officers to enter the side entrance of the building and follow Hackett to the tenth floor. After Hackett's arrest, his apartment was found to contain illegal drugs and paraphernalia, including cocaine in precisely the same percentage as that Johns took downstairs to sell to the officers. Also, in the bedroom of Hackett's apartment, the officers found a narcotics customer's list in Hackett's handwriting.

POINT II

There Was No Error In Distributing a Transcript of a Recorded Conversation With Three Sentences Excised.

Hackett contends that it was reversible error for the Court to permit the jurors to be shown a transcript of recorded conversations which contained three sentences that had been scissored out in order to remove objectionable matter. This claim is meritless.

On the evening of July 23, 1974 Officers Newton and Feurtado had a recording device secreted in their undercover car. The conversations—which lasted well over an hour—between the officers themselves and with Richard Johns were recorded.

On Friday, November 21, 1975, three days prior to trial, defense counsel was supplied with a complete transcript of these recorded conversations. The trial began on Monday, November 24, 1975, and Officer Newton was called as the Government's first witness. When the tape recording of the July 23, 1974 conversations was offered into evidence at the end of that first day of trial, defense counsel raised a number of objections. (Tr. 73). He argued that conversations between the police officers, without Johns present, concerning such matters as the health of the officers' children, were irrelevant. The Government acquiesced in not playing those portions of the tape, but the prosecutor pointed out that other conversations between the officers were clearly relevant. Specifically after Hackett had arrived at 230 Riverside Drive and Johns had gotten out of the car to follow him upstairs, the officers had described the movements of both Hackett and Johns as they were unfolding before them. The Court accepted the Government's argument that the officers' narrative descriptions of these events were present sense impressions and excited utterances under Rules 803 (1), (2) of the Federal Rules of Evidence.

Although counsel was plainly on notice that the Government intended to use the transcript already prepared and that, at the very least, it intended to show the jury that portion of the transcript containing the description by the officers of the events which unfolded after Hackett arrived on the scene, defense counsel made no suggestion that any portions of the transcript be excised. The Court then adjourned for the day before the transcript could be distributed and the tape played, though this was clearly to be the first order of business the next day.

The next morning, a full four days after having received the transcript, defense counsel for the first time suggested that certain sentences found in the portion of

the transcript that the Government intended to offer as present sense impressions of the poi officers contained conclusions about whether or not Hackett was Johns' source of cocaine. For example, one such phrase was:

> "Newton: . . . Hey Gary, if you can copy the plate of that car that is parked behind the Con Ed truck —a male and female [Hackett and Murphy] just got out of it. *We think that is his connect.*" (Tr. 85-86) (emphasis supplied).

The Court agreed that the second sentence of that portion of the transcript should be struck as conclusory, together with one other,* and ordered that those portions of the transcript be excised over defense counsel's objection that the pages should be retyped. Judge Palmieri took the position that the trial should not be delayed and that any claim of possible prejudice was fanciful. He stated that he would instruct the jury not to speculate about the excised portions.**

Defense counsel's failure to raise a prompt complaint concerning the transcript waived any claim. See *United States* v. *Chiarizio*, 525 F.2d 289, 294 (2d Cir. 1975). Moreover, the Court was entirely correct that no prejudice could have been suffered. First, the excisions were brief—three sentences in a very thick transcript—and the scissoring was not done in the jury's presence so as to

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* The Court agreed to strike the second sentence in the following portion of the transcript:

> "Yea, my man's [Hackett] still looking this way. That is it or that is his connect, we think." (Tr. 86).

During the playing of the tape still a third sentence was objected to and the Court ordered a recess while the sentence was excised. (Tr. 108-09).

** This instruction was never given, and it is indicative of the slight impact these excisions had that defense counsel never reminded the Court to give this instruction.

draw undue attention to the deleted portions. Compare *United States* v. *Harrington*, 490 F.2d 487, 495 (2d Cir. 1973), with *United States* v. *Calarco*, 424 F.2d 657, 661 (2d Cir.), *cert. denied*, 400 U.S. 824 (1970). Second, the three sentences that were removed were in that portion of the transcript where Officers Newton and Feurtado discussed what they had observed after Hackett arrived at 230 Riverside Drive and after Johns got out of the car to join Hackett. Even assuming that the jurors took time out from their considerations of the highly incriminating evidence that was actually being introduced against Hackett in this portion of the transcript to speculate about what was contained in the brief sentences that had been excised—a highly unlikely assumption—, the very worst that they could have surmised is that the officers had done in these passages precisely what they actually did, namely, express a conclusion that Hackett was likely Johns' "connection." That the officers had reached such a conclusion would hardly have come as a surprise to the jurors, since they had just listened to Newton's testimony that the officers had waited outside 230 Riverside Drive for Johns' connection to arrive for over an hour; that, when Hackett walked by the undercover car, he nodded to Johns and then walked to the elevator where he continued to stare at the car; and that Johns then suddenly broke off his conversation with the officers, walked to the side entrance of 230 Riverside Drive and followed Hackett up the elevator to the tenth floor of the building. Since the jurors' surmises, at worst, could not have resulted in any prejudice to Hackett, this claim is meritless. *Cf. United States* v. *Calarco*, *supra*, 424 F.2d at 661.* And in light of the fact that the potential for prejudice was *de mini-*

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* Indeed, Hackett concedes in his brief that the excised remarks were "only mildly incriminating." (Br. at 21).

mis, the trial judge can hardly be faulted for refusing to delay this trial any longer than it already had been.*

Moreover, even if the trial judge could be found to have abused his discretion in refusing to delay the trial, the error was clearly harmless. As already discussed, it is difficult to conceive how Hackett could be found to have suffered any prejudice as a result of the excisions. Also, this transcript was shown to the jury on the second day of a seven-day trial and was not shown to them again, although the jury was shown other tape transcripts during its deliberations after requesting to rehear the recordings of the Johns-Newton telephone calls. *Cf. United States* v. *Chiarizio*, *supra*, 525 F.2d at 294 n. 4. Finally, the proof against Hackett was so overwhelming that any error could not possibly have affected the verdict.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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* On October 28, 1975, with a jury panel waiting and the witnesses in the witness room, the trial had to be delayed after Hackett appeared in Court and advised Judge Palmieri that he personally had relieved his CJA-appointed attorney and had just retained his own attorney—an attorney who eventually refused to try the case because no fee agreement had been reached. (See Tr. 966-67).

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Lawrence B. Pedowitz, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 29th day of April, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Jeffrey Dwight Ullman, Esq.
410 Park Avenue
New York, N.Y. 10022

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Lawrence B Pedowitz

Sworn to before me this
29th day of April, 1976

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977